Lee Thye (as President and office bearer of the Selangor Yan Keng Benevolent Dramatic Assocation) v Tan Sri Ngan Ching Wen (as President and office bearer of the Selangor Chinese Assembly Hall)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R3–24–23–99
FAIZA TAMBY CHIK J
22 JUNE 1999

Civil Procedure *— Affidavits — Affidavit dated earlier than originating summons — Whether irregularity which can be cured — Rules of the High Court 1980 O 2 r 1 & O 41*

Civil Procedure *— Declaration — Application for — Only academic issue before court — Whether court should grant declaration*

Civil Procedure *— Declaration — Locus standi — Plaintiff not authorized to act on behalf of other permanent members of defendant — Whether plaintiff has locus standi*

Civil Procedure *— Parties — President of society named as defendant in suit — Whether sued in capacity of office bearer — Whether order made would be binding on members of society — Specific Relief Act 1950 s 42 — Societies Act 1966 s 9(c)*

The defendant (ie the Selangor Chinese Assembly Hall ('the SCAH'), being sued under the name of its president) is a parent association of 340 registered Chinese guilds, societies and associations which comprises of 22 permanent members and 318 ordinary members. The defendant received a requisition to request for an extraordinary general meeting ('the EGM') to delete r 3(3) of the rules of the defendant (r 3(3) stipulates that a representative of a permanent member is automatically a member of the board of directors). On 25 April 1999, more than two-third of the members present at the EGM voted for the resolutions to delete r 3(3) and also to amend related rules, like rr 7(3) and 7(7) as proposed in the requisition. Hence, the representatives of the 22 permanent members may become members of the board of directors through biennial election held during the annual general meeting ('AGM'). The plaintiff, by way of an originating summons applied, inter alia, that as founder members of the defendant, the plaintiff and the 21 members acknowledged as permanent members under r 3(2) of the rules of the defendant, be entitled to perpetual permanent membership in the defendant and for a declaration that a representative of the plaintiff and each of the 21 members are perpetually (and automatically) entitled to be a member of the board of directors of the defendant. A mandatory injunction was also sought by the plaintiff.

The defendant raised five preliminary objections to strike the originating summons, ie: (i) the plaintiff's affidavit-in-support affirmed prior to commencement of the plaintiff's action is materially irregular; (ii) the plaintiff's prayer for permanent membership in the

originating summons was not an issue in dispute among members of the defendant and the plaintiff's originating summons has become academic as the EGM had already approved the resolutions to delete r 3(3) and amend rr 7(3) and 7(7); (iii) the plaintiff had no locus standi to represent 21 other permanent members of the defendant; (iv) the plaintiff's originating summons is materially irregular as the plaintiff had applied for a mandatory injunction which is prohibitory in nature; (v) the court shall not grant a declaration of no practical consequence and mandatory injunction which is not capable of enforcing against the members of the defendant who had not been named as defendant(s) in this action.

Held, dismissing the application:

(1) There is no specific requirement in the rules for the affidavit to be dated subsequent to its filling, as the word 'dates' in O 41 r 9(2) of the Rules of the High Court 1980 could be interpreted to mean any date (before or after filing) (see p 398H–I).

(2) The requisition did not propose to take away the permanent membership of the 22 permanent members. A declaration will not be granted where there is no breach and no threat or intention to commit a breach of agreement. The prayers in the plaintiff's originating summons have also become academic as the EGM has already abolished the automatic right of the representatives of the permanent members to become the members of the board of directors (see pp 399G–400A).

(3) The plaintiff has not been authorized by the permanent members to speak for their behalf. The plaintiff has no locus standi to apply for declarations and mandatory injunction for and on behalf of the 21 other permanent members (see p 401D–E).

(4) A mandatory injunction is to compel the defendant to do something to prevent a breach of an obligation and not to restrain the defendant from doing something. In the premises, the relief sought in the plaintiff's originating summons is materially irregular and incurable (see p 401H–I).

(5) The defendant is not Tan Sri Ngan but SCAH who can only be sued through an officer (in this instance, the President Tan Sri Ngan himself). An order made against SCAH binds all its members. Section 9(c) of the Societies Act 1966 states that a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose (see p 404C–D). As all members are persons claiming rights to membership through the representative capacity of the president, they are also bound (see p 404E).

[Bahasa Malaysia summary

Defendan (ie Dewan Perhimpunan Cina Selangor ('SCAH tersebut'), yang didakwa di dalam nama presidennya) merupakan sebuah persatuan induk kepada 340 persatuan-persatuan Cina yang berdaftar yang mempunyai 22 ahli-ahli tetap dan 318 ahli-ahli biasa. Defendan telah menerima satu rekuisisi untuk meminta diadakan suatu mesyuarat umum luar biasa ('EGM tersebut') untuk memotong k 3(3) kepada peraturan-peraturan defendan (k 3(3) menetapkan bahawa seorang wakil kepada seorang ahli tetap secara serta-merta menjadi ahli kepada lembaga pengarah). Pada 25 April 1999, lebih daripada dua pertiga daripada ahli-ahlinya yang hadir di EGM telah mengundi terhadap resolusi untuk memotong k 3(3) dan juga untuk meminda peraturan-peraturan yang berkenaan, seperti kk 7(3) dan 7(7) sepertimana yang dicadangkan di dalam rekuisisi tersebut. Dengan itu, wakil-wakil kepada 22 ahli-ahli tetap boleh menjadi lembaga pengarah melalui pemilihan setiap dua tahun sekali yang diadakan semasa mesyuarat umum tahunan ('AGM'). Plaintif, melalui suatu saman pemula memohon, antara lain, bahawa sebagai pengasas ahli-ahli defendan, plaintif dan 21 ahli-ahli yang diiktiraf sebagai ahli-ahli tetap di bawah k 3(2) kepada peraturan-peraturan defendan, adalah layak kepada keahlian yang berterusan di dalam defendan dan untuk suatu deklarasi bahawa seorang wakil plaintif dan setiap daripada 21 ahli-ahli tersebut adalah layak secara berterusan (dan serta-merta) untuk menjadi ahli lembaga pengarah defendan. Satu injunksi mandatori juga telah dipohon oleh plaintif.

Defendan telah mengutarakan lima bantahan awal untuk membatalkan saman pemula itu, ie: (i) afidavit sokongan plaintif yang telah disahkan sebelum tindakan plaintif bermula adalah di luar aturan yang material; (ii) permohonan plaintif untuk mendapat keahlian tetap di dalam saman pemula bukan merupakan isu yang dipertikaikan antara ahli-ahli defendan dan saman pemula plaintif telah menjadi akademik kerana EGM tersebut telahpun meluluskan resolusi-resolusi untuk memotong k 3(3) dan meminda kk 7(3) dan 7(7); (iii) plaintif tiada locus standi untuk mewakili 21 ahli-ahli tetap defendan yang lain; (iv) saman pemula plaintif merupakan luar aturan yang material kerana plaintiff telah memohon untuk injunksi mandatori yang bersifat menegah; (v) mahkamah tidak akan memberi suatu deklarasi yang tiada akibat praktik dan injunksi mandatori yang tidak dapat dikuatkuasakan terhadap ahli-ahli defendan yang tidak dinamakan sebagai defendan(defendan-defendan) di dalam tindakan ini.

Diputuskan, menolak permohonan tersebut:

(1) Tiada keperluan khusus di dalam peraturan-peraturan tersebut untuk afidavit itu diberi tarikh selepas ia difailkan, kerana perkataan 'tarikh-tarikh' di dalam A 41 k 9(2) Kaedah-Kaedah Mahkamah Tinggi 1980 boleh ditafsirkan sebagai bermaksud

A mana-mana tarikh (sebelum atau selepas pemfailan) (lihat ms 398H–I).

(2) Rekuisisi itu tidak bercadang untuk mengambil balik keahlian tetap 22 ahli-ahli tetap itu. Suatu deklarasi tidak akan diberi di mana tidak terdapat perlanggaran dan tiada ugutan atau niat B untuk melakukan suatu perlanggaran perjanjian. Permohonan-permohonan di dalam saman pemula plaintif juga telah menjadi akademik oleh kerana EGM telahpun memansuhkan hak serta-merta wakil ahli-ahli tetap untuk menjadi ahli-ahli lembaga pengarah (lihat ms 399G–400A).

(3) Plaintif tidak diberi kuasa oleh ahli-ahli tetap untuk bercakap bagi C pihak mereka. Plaintif tidak mempunyai locus standi untuk memohon deklarasi-deklarasi dan injunksi mandatori untuk dan bagi pihak 21 ahli-ahli tetap yang lain (lihat ms 401D–E).

(4) Injunksi mandatori adalah untuk mendesak defendan untuk berbuat sesuatu bagi mengelakkan berlakunya perlanggaran D kewajipan dan bukan untuk menghalang defendan daripada berbuat sesuatu. Di dalam premis ini, relif yang dicari di dalam saman pemula plaintif adalah di luar aturan yang material dan tidak boleh dipulihkan (lihat ms 401H–I).

(5) Defendan bukan Tan Sri Ngan tetapi SCAH yang hanya boleh E didakwa melalui seorang pegawai (di dalam hal ini, Presiden Tan Sri Ngan sendirinya). Suatu perintah yang telah dibuat terhadap SCAH mengikat semua ahli-ahlinya. Seksyen 9(c) Akta Persatuan 1966 menyatakan bahawa suatu persatuan boleh mendakwa atau didakwa di dalam nama mana-mana satu ahli-ahlinya seperti mana yang akan diumumkan oleh Pendaftar dan didaftarkan oleh F beliau sebagai pegawai awam persatuan itu bagi tujuan tersebut (lihat ms 404C–D). Oleh kerana semua ahli-ahlinya merupakan individu yang menuntut hak terhadap keahlian melalui kuasa wakil presiden, mereka juga adalah terikat (lihat ms 404E).]

G **Notes**

For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

For cases on declaration generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1497–1536.

H For cases on parties, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3228–3408.

Cases referred to

Arab-Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor I [1998] 7 MLJ 536 (refd)

H Stacey v Diamond Metal Products Co Ltd & Anor [1935] MLJ 249 (refd)

Kewangan Bersatu Bhd (previously known as Kewangan Usaha Bersatu Bhd) v Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79 (refd)
Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd [1989] 1 MLJ 383 (refd)
Lau Yeok Lin & Ors v Hip Soon Engineering & Construction Sdn Bhd [1988] 2 MLJ 308 (refd)
Mellstrom v Garner & Ors [1970] 1 WLR 603; [1970] 2 All ER 9 (refd)
Tengku Jaffar bin Tengku Ahmad v Karpal Singh [1993] 3 MLJ 156 (refd)
Teoh Eng Huat v Kadhi, Pasir Mas & Anor [1990] 2 MLJ 300 (refd)

Legislation referred to

Rules of the High Court 1980 O 2 r 1(1), O 41 r 9
Societies Act 1966 ss 7(3)(e), 9(c), Schedules I and II
Specific Relief Act 1950 ss 42, 53

Chandran G Nair (*Thevin Chandran & Wong*) for the plaintiff.
KS Lee (*KB Chua & Co*) for the defendant.

Faiza Thamby Chik J: This is an application (encl 1) for a:

(1) A declaration that as founder members of the Selangor Chinese Assembly Hall ('the SCAH'), the plaintiff and the 21 permanent members acknowledged as permanent members under r 3(2) of the SCAH Rules are entitled to perpetual permanent membership in the SCAH;

(2) A declaration that a representative of each of the plaintiff and the 21 permanent members are perpetually (and automatically) entitled to be a member of the board of directors of SCAH;

(3) (This prayer has now been withdrawn);

(4) A mandatory injunction restraining the defendant from among other things from amending the provisions of r 3(2) entitling them to automatic membership to the board of directors of SCAH;

(5) Costs; and

(6) Such further or other relief.

The application is supported and opposed by the following affidavits:

(1) Supporting affidavit of Lee Thye @ Lee Shan Too dated 16 April 1999 (encl 2);

(2) Opposing affidavit of Tan Sri Ngan Ching Wen dated 21 April 1999 (encl 4);

(3) Supporting affidavit of Lee Thye @ Lee Shan Too dated 22 April 1999 (encl 5);

(4) Supporting affidavit of Lee Thye @ Lee Shan Too dated 7 May 1999 (encl 9);

(5) Opposing affidavit of Tan Sri Ngan Ching Wen dated 7 May 1999 (encl 10);

(6) Opposing affidavit of Tan Sri Ngan Ching Wen dated 11 May 1999 (encl 11);

(7) Opposing affidavit of Dato' Lim Guan Teik dated 14 May 1999 (encl 12).

The defendant is a parent association of 340 registered Chinese guilds, societies and associations which comprises of 22 permanent members and 318 ordinary members (para 4 of the defendant's affidavit (encl No 4). On or about 1 April 1999, the defendant received a requisition ('the Requisition') duly signed by all 128 members of the defendant (more than $^1/_3$ of the total members of the defendant) to request for an extraordinary general meeting ('the EGM') which the board of directors has no alternative but to comply with r 25(3) to convent the EGM on 25 April 1999 within one month from the date of the requisition (para 8 of the defendant affidavit enclosure No 4 and para 6 of the defendant's second affidavit encl No 10). The Requisition proposed to amend to the rules of the defendant particularly deletion of r 3(3) of the rules of the defendant which stipulates that a representative of a permanent member is automatically a member of the board of directors (para 7 of the defendant's second affidavit encl No 10).

On 25 April 1999, more than two-third of the members present at the EGM voted for the resolutions to delete r 3(3) and also to amend related rules, like rr 7(3) and 7(7) as proposed in the requisition, ie 155 members voting for the resolutions and 29 members voting against the Resolutions (exh 'D-4' and para 8 of the defendant's second affidavit encl No 10). With the deletion of r 3(3) of the rules of the defendant duly approved by the EGM in accordance with r 25(2) of the rules of the defendant, the representatives of the 22 permanent members no longer automatically become the members of the Board of Directors. The representatives of the 22 permanent members may become members of the board of directors through biennial election held during the annual general meeting ('AGM').

On 19 April 1999, the plaintiff, by way of the plaintiff's originating summons (encl No 1) applied for the following orders:

(a) For a declaration that as founder members of the defendant, the plaintiff and the 21 members acknowledged as permanent members under r 3(2) of the Rules of the defendant are entitled to perpetual permanent membership in the defendant (prayer 1);

(b) For a declaration that a representative of the plaintiff and each of the 21 members are perpetually (and automatically) entitled to be a member of the board of directors of the defendant (prayer 2);

(c) A mandatory injunction restraining the defendant either by their board of directors or members or in any way whatever from (prayer 4):

(i) proposing and adopting any motion, resolution or amendment to amend rr 3(2) and 7(3) of the rules of the defendant; whereby

the plaintiff and 21 other permanent members are removed and/or deprived of their permanent membership in any manner whatsoever;

(ii) proposing and adopting any motion, resolution or amendment to amend rr 3(3) and 7(3) whereby the automatic rights of the permanent members of the board of directors are removed and/or deprived in any manner whatsoever; and

(iii) amending the SCAH rules in any manner whatsoever to remove and or deprive plaintiff and the 21 members of the permanent membership and their automatic membership in the board of Directors.

The defendant raised five preliminary objections to the plaintiff's originating summons in encl 1.

(i) The plaintiff's affidavit-in-support (encl No 2) which was affirmed prior to commencement of the plaintiff's action is materially irregular and is not admissible.

(ii) The plaintiff's permanent membership in prayer 1 of the plaintiff's originating summons which has not been an issue in dispute among members of the defendant, is prematurely brought before this honourable court and is academic in nature. Prayer 2 and 4 of the plaintiff's originating summons has become academic as the EGM has already approved the resolutions to delete r 3(3) and amend r 7(3) and r 7(7) and the plaintiff's originating summons has therefore become academic.

(iii) The plaintiff has no locus standi to represent 21 other permanent members of the defendant.

(iv) Prayer 4 of the plaintiff's originating summons (encl No 1) is materially irregular as the plaintiff has applied for a mandatory injunction which is prohibitory in nature.

(v) This honourable court shall not grant declaration of no practical consequence and mandatory injunction which is not capable of enforcing against the members of the defendant who have not been named as defendant(s) in this action. Therefore, the plaintiff's originating summons should be struck out with cost.

The defendants submitted that the plaintiff's affidavit-in-support of the plaintiff's originating summons (encl No 1) is materially irregular and inadmissible. The plaintiff's originating summons in encl No 1 is dated 19 April 1999 and was filed on that day. The plaintiff's affidavit-in-support (encl No 2) was affirmed on 16 April 1999 ie three days prior to the date of filing.

At the time of affirmation of the plaintiff's affidavit-in-support, on 16 April 1999, there was no existing cause or matter as the plaintiff's originating summons was filed and registered on 19 April 1999 and therefore the plaintiff's action only commenced on 19 April 1999. It follows that the plaintiff's affidavit-in-support has not been affirmed in an existing

cause or matter and was 'still-born'. Moreover, the plaintiff's affidavit-in-support did not, in any manner, make any reference in support of the plaintiff's originating summons (encl No 1). The plaintiff's affidavit-in-support was materially irregular and inadmissible. In *Arab-Malaysian Finance Bhd v Serajudin bin Mohd Ismail & Anor* [1998] 7 MLJ 536, the court said at p 539:

> With respect, I am of the view that specific attention ought to be given to O 41 r 1 of the RHC which reads:
>
> (1) Subject to paragraph (2) and (3), every affidavit sworn in a cause or matter must be entitled in that cause or matter.
>
> (2) Where a cause or matter is entitled in more than one matter, it shall be sufficient to state the first matter followed by the words 'and other matters', and where a cause or matter is entitled in a matter or matters and between parties, that part of the title which consists of the matter or matters may be omitted.
>
> (3) ...
>
> In other words, an affidavit affirmed in a cause or matter must be intituled in that cause or matter. For a cause or matter to be properly entitled or intituled, the case number relating to that cause or matter is a vital factor that must be present, and before a case number is given to that particular cause or matter it must comply with O 1 r 4 of the RHC which defines a 'cause book' as a book kept in the registry in which the number of, and other details relating to, a cause or matter are entered. Therefore, where as in this case, an affidavit has been affirmed exactly one week before the os was filed, surely the said affidavit cannot be said to have been affirmed in a cause or matter because properly speaking there was no cause or matter that had been registered at the registry. Whilst I agree that in so far as interlocutory or ex parte applications are concerned, the courts have accepted the affidavit affirmed prior to the filing of the application on the express undertaking of counsel to reswear the said affidavit, but in the present case where the affidavit forms the evidence on which the application is to be launched, and if the affidavit has not been affirmed in an existing cause or matter, then the filing of such an affidavit cannot be treated as an irregularity that can be cured. In my view, it is a nullity as it supports a non-existent cause or matter. In other words, the affidavit is 'stillborn' and no resuscitative procedure by way of O 2 r 1 of the RHC which relates to the liberal stand taken by the courts in respect of non-compliance of the rules, can breathe life into the 'still born'. It remains a nullity. In the circumstances, even O 41 r 4 of the RHC which reads:
>
> > 'An affidavit may, with the leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.'
>
> cannot save the day for the plaintiff.

Therefore that case decided that the affidavit affirmed prior to commencement of an action as a nullity and its effect incurable. The originating summons stood unsupported and thus must be dismissed.

The plaintiffs admitted that the supporting affidavit of Lee Thye @ Lee Shan Too was signed on 16 April 1999 but filed on 19 April 1999 and as such there appears to be a delay of three days. (Mr Lee, the plaintiff, a senior lawyer, accompanied the solicitor's clerk to court on the afternoon of

16 April 1999 to assist to have the matter fixed, on a certificate of urgency, before a judge, the following week as one of the prayers was an interlocutory injunction). Although a queue number was obtained owing to a large crowd, the clerk was not able to file the document before the registry closed. The day after, Saturday was a public holiday (Awal Muharram) and they were able to file the documents only on Monday, 19 April 1999. Because of this delay, the defendants contended that as there was no existing cause or matter and the affidavit was therefore irregular.

The plaintiff have since taken the liberty of filing an affidavit by Mr Lee giving the reasons why the originating summons could not be filed on 16 April and was only filed on 19 April (see affidavit dated 10 June 1999). Lamin J (as he was then) in *Lau Yeok Lin & Ors v Hip Soon Engineering & Construction Sdn Bhd* [1988] 2 MLJ 308 at p 310 said:

> As regards the date of the affidavit, the learned judge saw nothing improper as it had been filed according to the rules. In the present case before me, the difference was only one day. In fact, the affidavit was sworn on the afternoon or 12 November 1987 and the statement of claim accompanying the writ was dated the same day. The writ was filed in the registry on the following day, ie the 13th. If in the present case, it is insisted upon that there was still that difference of one day, I am of the view that it did not affect its validity unless it can be shown that it is improper which learned counsel for the applicants/defendants had not done. Similarly in the case of *Ong Heok & Anor v Ooi Bee Tat & Ors* [1982] 2 MLJ 326 the affidavit in support of the application for injunction was sworn one day before the issue of the writ, and the learned judge did not find it improper.

In *Kewangan Bersatu Bhd (previously known as Kewangan Usaha Bersatu Bhd) v Metropolitan Property Holdings Sdn Bhd* [1996] 1 MLJ 79 it was held that in absence of any requirement of law for the affidavit to be affirmed on the same date as that on which the originating summons is filed or later, an affirmation which precedes the filing of the affidavit is in order. There is also no requirement for the affidavit to be affirmed at the same time that the originating summons is file (see p 83B-C, E).

In *Kewangan Bersatu Bhd*'s case the affidavit in support of the originating summons filed in the proceedings was dated earlier than that in the originating summons and a preliminary objection was taken. Selventhiranathan J after noting that '... There is no requirement for the affidavit to be affirmed at the same time that the originating summons is filed' then went on to comment after looking at O 41 r 9(2) of the Rules of the High Court 1980 (RHC). 'This goes to show that the Rules Committee in drafting r 9(2) with reference to 'every affidavit' in the singular and to 'dates' in the plural envisaged that an affidavit could well be affirmed at an earlier date and filed at a later date, depending on the dictates of necessity and situational factors.' From these cases it would appear that there is no specific requirements in the rules for the affidavit to be dated subsequent to its filing, and as the word 'dates' in O 41 r 9(2) could be interpreted to mean any date (before or after filing), the decision of Kamalanathan Ratnam J in the *Arab Malaysian* case should be viewed with caution, particularly his conclusion is that it is a nullity.

In *Ko Ko Ma Pony Horse Centre v Rasa Sayang Beach Hotels (Pg) Bhd* [1989] 1 MLJ 383, Mohamed Dzaiddin J (as he then was) took a liberal approach when he observed:

> ... But, where the affidavit had been sworn before the issue of the writ, an order could be made on the plaintiff's undertaking to have it resworn and filed (*Green v Prior* [1886] WN 50; *Supreme Court Practice 1985* O 29/1/16 at p 462). In fact, this irregularity can now be rectified by Tan reswearing the affidavit and filing it in court.

Therefore the plaintiff in the instant case could also file a fresh affidavit dated 7 June 1999 to 'rectify' the position if the court did not indeed consider that it was an irregularity that needed to be corrected. In the *Arab Malaysian* case, Kamalanathan Ratnam J emphasized that an affidavit need be filed only after the filing of the originating summons. However, in considering *Lau Yeok Lam*'s case the learned judge remarked: 'This case before me is quite different. It is not one day but one week and the impropriety has been considered.' In other words, if it was indeed late by only one day and the reasons thereof explained, impliedly it would appear the judge and the law would be 'forgiving'.

A similar interpretation is reflected in *H Stacey v Diamond Metal Products Co Ltd & Anor* [1935] MLJ 249, where the learned judge Terrell J observed: '... Certainly there may be cases in which an affidavit sworn a day or two previously, or even affidavits which have not even been sworn have been used on interlocutory application, on counsel's undertaking that the affidavit shall be resworn, or sworn and filed as the case may be.' Indeed, it would appear that courts have always to keep in mind O 2 r 1(1) RHC which is enacted to safeguard proceedings from being construed as a nullity and to have irregularities corrected. It was therefore submitted that if the court was of the opinion that date was significant, then the reaffirmed affidavit dated 7 June 1999 should be treated as having corrected the anomaly. As for me, I totally agree with the plaintiff's submission and therefore hereby dismiss the first preliminary objection raised by the defendant.

There was no dispute among the members of the defendant that the 22 permanent members of the defendant are not the permanent members. The requisition did not propose to take away the permanent membership of the 22 permanent members. The permanent membership of 22 permanent members are still stated in the rule. It is an academic issue before this court. Prayer 1 and prayer 4(a) of the plaintiff's originating summons (encl No 1) is prematurely brought before this court and is therefore academic. Further, a declaration will not be granted where there is no breach and no threat or intention to commit a breach of agreement (*Mellstrom v Garner & Ors* [1970] 1 WLR 603; [1970] 2 All ER 9 (CA)) (p 103 of the defendant's authority).

The prayer 2 and 4(b) and 4(c) of the plaintiff's originating summons (encl No 1) has now become academic too as the EGM of the defendant has approved the resolution to delete r 3(3) of the rules of the defendant and to amend r 7(3) of the defendant and its related rules. The plaintiff has

sought to declare (prayer 2 of the plaintiff's originating summons) that a representative of the plaintiff and each of the 21 permanent members are perpetually (and automatically) entitled to be members of the board of directors of the defendant. The plaintiff has further sought a mandatory injunction (prayer 4) to be granted restraining the defendant, either by their board of directors or members, or in any way whatsoever from proposing and adopting any motion, resolution or amendment to amend rr 3(3), 7(3) and 7(7) whereby the automatic rights of the permanent members to the board of directors are removed and/or deprived in any manner whatsoever.

On 25 April 1999, the extraordinary general meeting (EGM) was held as requisitioned by 128 members of the defendant in accordance with r 25(3) (paras 4, 5 and 6 of the defendant's second affidavit encl No 10). r 25(3) of the rules of the defendant was duly approved by the registrar of society which stipulates that:

> Upon receipt of request jointly submitted by one-third of the members proposing certain amendments to the Rules, the Board of Directors shall convene an extraordinary general meeting within one month to discuss the proposed amendments.
>
> (p 25 exh 'D-1' the defendant's affidavit encl No 4).

During the EGM, there were 155 members voting for the resolutions and 9 members voting against the resolutions. The resolutions proposed by 128 members in the requisitions was duly approved by $^2/_3$ majority present at the EGM in accordance with r 25(2) of the rules of the defendant. (Para 8 and exh 'D–4' of the defendant's second affidavit encl No 10). Rule 25(2) of the rules of the defendant stipulates that:

> Any amendment to the Rules shall be approved by a two-third (2/3) majority of the members present at the Annual General Meeting or Extraordinary General Meeting of members.
>
> (p 25, exh 'D-1' the defendant's affidavit encl No 4).

Upon the resolutions proposed by 128 members duly approved by the EGM, the representatives of the permanent members of the defendant shall no longer automatically become members of the board of directors without election. However, the representatives of the permanent members may offer themselves as candidates to stand for election to be elected as members of the board of directors. In *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300, the Supreme Court had declined to make any declaration as the daughter was no longer an infant. In view of the aforesaid, the prayers 2, 4(b) and 4(c) of the plaintiff's originating summons have become academic as the EGM has abolished the automatic right of the representatives of the permanent members to become the members of the Board of Directors.

On those ground, I hereby uphold the defendant's second preliminary objection.

Preliminary objection No 3 is that the plaintiff has no locus standi to represent the 21 other permanent members of the defendant in this action. In his originating summons (encl No 1), the plaintiff has sought declarations and mandatory injunction for and on behalf of the plaintiff

itself and the 21 other permanent members as stated in prayer 1 and prayer 2 of the plaintiff's originating summons. The defendant has affirmed in para 6 of the defendant's affidavit (encl No 4) that the plaintiff is not representing the 22 permanent members of the defendant. The plaintiff has admitted in para 5 of the plaintiff's second affidavit-in-reply (encl No 9) that the plaintiff is not acting in a representative capacity for the permanent members. Indeed, the title of the plaintiff's originating summons (encl No 1) has expressly shown that it is not a representative action at all. There is no affidavit deposed by any permanent members of the defendant in support of the plaintiff's originating summons (encl No 1) and the plaintiff also did not depose any affidavit for and on behalf of the 21 other permanent members of the defendant. On the contrary, Chinese Chamber of Commerce and Industry of Kuala Lumpur and Selangor ('CCCIKLS') and the Selangor and Kuala Lumpur Teo Chew Association ('SKLTCA') which are two permanent members of the defendant, have approved the resolution to abolish the automatic right of the representatives of the permanent members to be members of the board of directors and have expressly objected to the plaintiff's originating summons (para 5 of the defendant's third affidavit (encl No 11) and para 5 and 6 of the affidavit (ahli tetap defendan) encl No (12).

In view of the aforesaid, it is noted that the plaintiff has not been authorized by the permanent members to speak for their behalf, let alone seeking declarations and mandatory injunction on their behalf. The plaintiff has no locus standi to apply for declarations and mandatory injunction for and on behalf of the 21 other permanent members. The plaintiff may only have legal standing to protect or vindicate an interest of his own but not those of 21 other permanent members. In *Tengku Jaffar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156, the court held that:

> To possess locus standi, the applicant should be seeking to protect or vindicate an interest of his own. The plaintiff, purely on the ground of being of the Malay race and a subject of Sultan of Kelantan, was not clothed with the necessary locus standi since there was no form of interference of his private right beyond that of any other Malays and subjects of the Sultan of Kelantan. Therefore, the plaintiff had no locus standi to bring his suit against the defendant.

Therefore, I hereby uphold the defendant's third preliminary objection.

It is observed here that it is materially irregular to seek for an order for a mandatory injunction of which the subject matter is prohibitory in nature. Prayer 4 of the plaintiff's originating summons is to seek for a mandatory injunction restraining the defendant either by their board of directors or members from doing something as in prayer 4(a), (b) and (c) and the plaintiff does not seek for a mandatory injunction compelling the defendant to do something. A mandatory injunction is to compel the defendant to do something to prevent breach of an obligation and not to restrain the defendant from doing something. In the premises, the relief sought in prayer 4 of the plaintiff's originating summons is materially irregular and incurable. Section 53 of the Specific Relief Act 1950 stipulates that:

Mandatory Injunctions

When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

On pp 1070–1071 of *Cheshire, Fifoot and Furmston's Law of Contract (Second Singapore and Malaysian Edition)* the author states as follows:

Another way in which the performance of a contract in specie may be enforced is by the grant of an injunction. An injunction is either prohibitory or mandatory. So far as concerns the law of contract, a prohibitory injunction is granted only in the case of a negative promise. If, for instance, the defendant has broken his agreement not to ring the church bell at five o'clock each morning or not to sell beer other than that brewed by the plaintiff, the court will order him to refrain from doing what he has expressly promised not to do. This is equivalent to the 'specific performance by the court of that negative bargain which the parties have made'.

A mandatory injunction, on the other hand, is restorative in its effect, not merely preventive. It direct the defendant to take positive steps to undo what he has already done in breach of the contract. Thus he may be compelled to demolish or modify a building which he has erected or to remove a road which he has constructed if what he has done is not in accordance with the terms of the contract.

By reasons of the aforesaid, I uphold the defendant's fourth preliminary objection.

It was submitted by the defendant that in the plaintiff's originating summons, the plaintiff has only named one defendant in this action, ie Tan Sri Ngan Ching Wen as the president and office-bearer of The Selangor Chinese Assembly Hall ('SCAH'). No member of the defendant including the 128 members who have signed the requisition to amend the rules of the rules of the defendant, has been named as defendant in this action. In the event that the two declarations and the mandatory injunction were granted, the orders would not be binding upon the members of the defendant. It is submitted that support is found in s 42 of the Specific Relief Act 1950 which stipulates that:

A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, those parties would be trustees.

However, r 25(3) of the rules of the defendant, which has been duly approved by the Registrar of Society pursuant to the Societies Act 1966, stipulates as follows:

Upon receipt of request jointly submitted by one-third (1/3) of the members proposing certain amendments to the Rules, the Board of Directors shall convene an Extraordinary General Meeting within one month to discuss the proposed amendments.

(p 25, exh 'D-1' the defendant's affidavit, encl No 4).

In other words, the members of the defendant may exercise their members' right pursuant to r 25(3) of the rules of the defendant to requisition an extraordinary general meeting to amend the rules of the rules of the defendant. By virtue of r 25(3) of the rules of the defendant, the board of directors has no alternative but to convene an extraordinary general meeting within one month to discuss the proposed amendment. By virtue r 25(2) of the rules of the defendant, the members may amend the rules of the rules of the defendant accordingly. In the event that the declarations and mandatory injunction sought by the plaintiff are granted which are no enforceable against the members of the defendant and that the members may requisition an extraordinary general meeting to amend the rules pursuant to the members' right in rr 25(3) and 25(2), there will be a constitutional crisis in the defendant organisation. The defendant and the board of directors of the defendant, on one hand are bound by the orders (if so granted) not to amend any rules against the orders so granted and on the other hand, are bound by r 25(3) of the rules of the defendant duly approved by the registrar of societies to convene an extraordinary general meeting to discuss amendment and by r 25(2). The board of directors has no power to restrain the members from amending the rules.

In the premises, it is submitted that the orders if so granted are orders which are not enforceable against the members of the defendant, but only against the defendant who cannot assert any right to prevent or restrain the members to exercise its members' right pursuant to rr 25(3) and 25(2) of the rules of the defendant. All the constitutions and rules of all registered society (including that of the defendant) must be approved by the registrar of societies (see s 7(3)(e), Schedule 1 and Schedule II of the Societies Act 1966). *Malaysian Court Practice High Court* (Issue 5) in p 383 states as follows:

> A declaration may not be made against a person who has asserted no right nor formulated any specific claim: *Re Clay* [1919] 1 Ch 66; nor for a mere legal right without consequential relief; *Gray v Spyer* [1922] 2 Ch 22 (CA); *Nixon v Attorney General* [1930] 1 Ch 566; nor where the issue is only of academic interest or where the purpose of seeking a declaration was to cause delay: *Low Kum Yoon v The Kim Huah* [1979] 1 MLJ 83; *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300; *Pedley v Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307; or on hypothetical issues or issues of no practical consequence: *Lim Kim Cheong v Lee Johnson* [1993] 1 SLR 313.

Hence, the defendant submitted that the plaintiff's originating summons be dismissed with cost on this ground alone as the declarations and mandatory injunction if so granted are not enforceable against members who are not named as defendants and who are entitled to assert their rights to amend the rules in respect of the orders so granted (if any). Similarly, the declarations and mandatory injunction (if so granted) are only enforceable against the defendant who asserts no right to restrain the members of the defendant from exercising their members' right pursuant to r 25(2) and 25(3) of the rules of the defendant. Therefore, the declarations and mandatory injunction (if so granted) become academic and of no practical consequence. Moreover, s 53 of the Specific Relief Act stipulates that:

> When, to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

The court shall only grant mandatory injunction which the court is capable of enforcing and therefore, in this action, this court shall not grant the mandatory injunction as prayed in the plaintiff's originating summons because such mandatory injunction is not capable of being enforced against the members who may assert its right in accordance with the rules of the defendant approved by the registrar of societies in accordance with the Societies Act.

It is observed that the defendants have failed to appreciate that the defendant is not Tan Sri Ngan but SCAH who can only be sued by an officer (in this instance, the President Tan Sri Ngan himself). An order made against SCAH binds all its members. Section 9(c) of the Societies Act states that 'a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society.' To interpret a declaration order against SCAH represented by the President as in this case to only bind the President and Committee is clearly incorrect and illogical. Section 42 of the Specific Relief Act refers to parties to the suit — the party is SCAH who is presented by Tan Sri Ngan. In other words any order made binds SCAH: as all members are persons claiming rights to membership through the representative capacity of the president they are also bound. To suggest that a declaratory order is not binding on the members is clearly a poor appreciation of the legal principles relating to suits commenced against or for unincorporated associations. In this case, the named officer is merely a representative and the suit can only be brought to court against the unincorporated body through its public officer as the case may be.

By reason of the aforesaid I hereby dismiss the fifth preliminary objection raised by the defendant.

In the result, the originating summons of the plaintiff in encl (1) is dismissed with costs.

Application dismissed.

Reported by Benjamin Yong